92-1832

Supreme Court, U.S.
FILED
MAY 17 1993
OFFICE OF THE CLERK

NO. ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER

VS.

MARVIN THOMAS MATTHEWS,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
COMMONWEALTH OF PENNSYLVANIA

ROBERT W. FERRELL, ESQUIRE
I.D. #36811
KENNETH A. OSOKOW, ESQUIRE
I.D. #22554
DISTRICT ATTORNEY'S OFFICE
LYCOMING COUNTY COURTHOUSE
48 WEST THIRD STREET
WILLIAMSPORT, PA 17701
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. In deciding that probable cause to conduct a warrantless search was lacking where a known, citizen informant gave information against penal interest to a police officer who personally verified the information, did the decision of the Pennsylvania courts conflict with applicable decisions of this Honorable Court?

2. Where state court, presented with similar cases, have differed with each other and among themselves in their interpretation and application of Supreme Court decisions regarding probable cause, is further guidance needed from this Honorable Court?

LIST OF PARTIES

All parties to the proceeding appear in the caption of the case. Thus, a listing is omitted in accordance with Rules of the Supreme Court, Rule 14.1(b).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	2
STATEMENT OF CASE.....	4
REASONS FOR GRANTING THE WRIT	
1. The decisions of the Superior and Supreme Courts of the Commonwealth of Pennsylvania in the instant case conflict with decisions of this Honorable Court regarding probable cause to conduct a warrantless search.....	8
2. State courts have differed in their opinions of what constitutes probable cause in situations similar to the instant case, not only between states but also among the same state's courts; further guidance from this Honorable Court is needed.....	18
CONCLUSION.....	30
APPENDIX	
OPINION AND ORDER 5/13/91....	A1
SUPERIOR COURT OPINION 7/22/92	A18
ORDER OF SUPERIOR COURT.....	A41
ORDER OF SUPREME COURT.....	A42

TABLE OF AUTHORITIES

	PAGE
Commonwealth v. Bakoian, 588 N.E.2d 667 (Mass. 1992)..	25
Commonwealth v. Brown, 581 N.E.2d 505 (Mass.App. 1991).....	24
Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985).....	8
Commonwealth v. Ramon, 583 N.E.2d 883 (Mass.App. 1992).....	25
Commonwealth v. Weidenmoyer, 539 A.2d 1291 (Pa. 1988).....	27
Draper v. United States, 358 U.S. 307 (1959).....12,13,14, 16,18,21,25	
Illinois v. Gates, 462 U.S. 213 (1983).....9,10,12,14 16,17,18,24	
Minnis v. State, 577 So.2d 973 (Fla.App. 1991).	19
People v. DiFalco, ___ N.E.2d ___ (N.Y. 1993), 1993 WL 47279 (N.Y.).....	23
State v. Brown, 798 P.2d 284 (Utal App. 1990).	19
State v. Tays, 836 S.W.2d 596 (Tenn.Cr.App. 1992).....	20
United States v. Harris, 403 U.S. 573 (1971).....11,12,18	
United States v. Wilson, 964 F.2d 807 (8th Cir. 1992).	10

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

COMMONWEALTH OF PENNSYLVANIA, PETITIONER

V.

MARVIN THOMAS MATTHEWS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

The petitioner the Commonwealth of Pennsylvania respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Pennsylvania, entered in the above-titled proceeding on February 17, 1993.

OPINIONS BELOW

Neither the opinion of the Pennsylvania Superior Court, nor the denial of appeal by the Pennsylvania Supreme Court, is reported. They are reprinted respectively in the Appendix hereto, pp. A18 and A42, infra.

JURISDICTION

Respondent Marvin Thomas Matthews was convicted on May 20, 1991 of possession of a controlled substance, crack cocaine, with intent to deliver. Respondent was sentenced on October 8, 1991. At trial, the defense raised the issue that police authorities lacked probable cause to conduct a warrantless search of the respondent's vehicle. The motion to suppress evidence obtained from the search was denied, as were post verdict motions. Respondent appealed to the Pennsylvania Superior Court. The Superior Court found for the respondent on July 22, 1992, vacating the judgment of sentence and remanding for a new trial. The Commonwealth's application for reargument was denied.

The Commonwealth then petitioned to the Pennsylvania Supreme Court. In a per curiam order, the court denied the

petition on February 17, 1993. It is from this final order that the Commonwealth respectfully invokes the juridsiction of this Court under 28 U.S.C. Section 1257(3).

STATEMENT OF THE CASE

At approximately 1:27 a.m. on September 14, 1990, Officer Sorage of the Williamsport Bureau of Police interviewed an informant at police headquarters located in City Hall in Williamsport, Pennsylvania. Officer Sorage had been involved in numerous drug investigations for approximately three years. The informant stated that he was bringing information about the respondent to the attention of the police because he was addicted to cocaine and wished to turn in his supplier, the respondent, in an attempt to end his addiction. The informant told the officer that the respondent was a black male from Philadelphia who dealt in crack cocaine. The informant stated that he had gone to Philadelphia in the past with the respondent to purchase cocaine; that he

had spoken with the respondent earlier, at which time the respondent indicated he was going to Philadelphia to get cocaine. The informant said that the respondent would be returning to Williamsport at any time, as he usually returned around 1:30-2:00 a.m., and that this time he would be carrying $2,000.00 worth of cocaine. The informant indicated that the respondent would be driving a small brown two door vehicle, possibly a Renault Alliance, and would reenter the city via the Market Street bridge. He provided Officer Sorage with the petitioner's telephone number, and described the location of petitioner's residence (where respondent resided with his girlfriend Juanita Hester). The informant said that upon his return, the respondent would park in the alley near his residence. Officer Sorage verified the address and telephone number with

police records and the telephone number with police records and the telephone company. Also, Officer Sorage recalled that he had personally observed a vehicle similar to the one described by the informant parked near the petitioner's residence.

The informant accompanied the officer to a location near the Market Street bridge. At 2:21 a.m., the vehicle described by the informant crossed the Market Street bridge and drove into Williamsport, parking in the alley near the respondent's residence. The informant identified the driver as the respondent. The officer confronted the respondent, who identified himself and stated that he was returning from Philadelphia where he had been visiting his family. The officer advised the respondent that he had information the respondent was carrying controlled

substances. The officer requested permission to search the vehicle; the respondent refused. The officer then searched the vehicle without permission of the respondent. The initial search at the scene resulted in the discovery of a paper bag containing six hundred plastic vials of the type used to package crack cocaine. The respondent stated that he used the vials to market perfume. The search, continued later in a secured area, also yielded a white crystalline substance which was determined to be cocaine.

The respondent was charged with Possession of a Controlled Substance. At trial, a motion to suppress evidence for lack of probable cause to conduct the search was filed. The motion was denied. The respondent was convicted May 20, 1991 of Possession of a Controlled Substance, crack cocaine, with Intent to Deliver.

Post verdict motions regarding the sufficiency of probable cause were denied. The respondent was sentenced October 8, 1991. The respondent appealed the issue to the Pennsylvania Superior Court, who found for the respondent on July 22, 1992. The court denied the Commonwealth's petition for reargument. The Commonwealth then petitioned to the Pennsylvania Supreme Court. In a per curiam order, the court denied the petition on February 17, 1993.

REASONS FOR GRANTING THE WRIT

I.

The decisions of the Superior and Supreme Courts of the Commonwealth of Pennsylvania in the instant case conflict with decisions of this Honorable Court regarding probable cause to conduct a warrantless search.

In Commonwealth v. Gray, 503 A.2d 921 (1985), Pennsylvania adopted the

"totality of the circumstances" test for probable cause which was set forth in Illinois v. Gates, 462 U.S. 213 (1983). In the instant case, the Pennsylvania appellate courts held that under the Gates test, probable cause was lacking to justify the search. The Commonwealth submits that the factors in the instant case are even more compelling for a finding of sufficient probable cause than those present in Gates. The Commonwealth believes that this Honorable Court will find the Pennsylvania appellate courts have read the requirements of this Court's Fourth Amendment decisions too restrictively, as did the Illinois Supreme Court in Gates. Gates, 462 U.S. at 217.

To begin, Gates involved an anonymous letter, whereas in the present case the information was given by a known, citizen informant. "[I]f an

unquestionably honest citizen comes forward with a report of criminal activity - which if fabricated would subject him to criminal liability - we have found rigorous scrutiny of the basis of his knowledge unnecessary." Id. at 233-234. In the case at hand, the officers had an opportunity to question the informant face to face and determine his credibility. This was not possible in Gates. In a similar drug case under the federal system, an informant told agents that the defendant was in possession of methamphetamine. The Eighth Circuit, in finding sufficient probable cause for a warrant, relied in part on the agent's ability to assess first-hand the credibility of the informant. United States v. Wilson, 964 F.2d 807, 810 (8th Cir. 1992). Again, the officers in the instant case were able to make a similar determination.

Moreover, the informant in the instant case made declarations against penal interest. He not only admitted to using drugs, but also to accompanying the respondent in the past while the respondent purchased drugs. See Appendix pp. A2 and A20. In United States v. Harris, 403 U.S. 573 (1971), the informant while providing information to the authorities admitted that he had purchased "illicit whiskey." Id. at 583. This Court said:

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility - sufficient at least to support a finding of probable cause to search.

Id. Under Harris, then, an informant's declaration against penal interest would be a significant factor in a "totality of

the circumstances" determination. Arguably, such a declaration in and of itself would, under Harris, be enough for probable cause without need for more. However, in the instant case the Pennsylvania Courts did not consider the informant's declaration against penal interest in their opinion.

Another critical factor in the instant case was the verification of the information by the officer. In Gates, this Court pointed to United States v. Draper, 358 U.S. 307 (1959) as being the "classic case on the value of corroborative efforts of police officials." Id. at 242. In Draper, the police set up surveillance at a Denver train station based on the information provided by a paid informant. The information corroborated by the officer concerned the defendant's physical description, clothing, that he was

carrying a tan zipper bag, and that he was walking fast. Draper, 358 U.S. at 309-310. The officer then arrested the defendant and searched him, finding heroin. The Draper court held that the corroborative efforts of the officer were enough to establish probable cause. Id. at 314.

The facts of the instant case are similar. The officer personally verified the information concerning the defendant which he received from the informant, including the identification of the defendant and the vehicle in question. The officer personally verified that the defendant returned to the address indicated by the informant at the time predicted by the informant. Under Draper, this corroboration would have been sufficient to establish probable cause.

The Pennsylvania courts in the instant case pointed out that the verification of the details by the officer

> ...did not serve to heighten the reliability of the final, critical item of information, that appellant was returning with drugs to deal. The information which was provided and verified was available to any friend, acquaintance, or neighbor and was not, in and of itself, incriminating. Therefore, the Gates test has not been met.

See Appendix pp. 33. This is a clear misreading of Gates, and of Draper. In both cases, it was the corroboration of innocent details that led to a finding of probable cause. The Gates decision specifically addressed this issue:

> The Supreme Court of Illinois reasoned that Draper involved an informant who had given reliable information on previous occasions, while the honesty and reliability of the anonymous informant in this case were unknown to the Bloomingdale police. While this distinction might be an apt one at the time the Police Department received the anonymous letter, it became far less significant after Mader's independent investigative work occurred. The corroboration of the letter's

predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, an that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true. "[B]ecause an informant is right about some things, he is more probably right about other facts, " - including the claim regarding the Gateses' illegal activity. This may well not be the type of "reliability" or "veracity" necessary to satisfy some views of the "veracity prong" of Spinelli, but we think it suffices for the practical, common-sense judgment called for in making a probable cause determination. It is enough, for purposes of assessing probable-cause, that "[c]orroboration through other sources of information reduced the chances of a reckless or prevaricating tale," thus providing "a substantial basis for crediting the hearsay."

Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. The letterwriter's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant had access to accurate information of this type a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gateses' alleged illegal activities. Of course, the Gateses' travel plans might have been

learned from a talkative neighbor or travel agent; under the "two-pronged test" developed from Spinelli, the character of the details in the anonymous letter might well not permit a sufficiently clear inference regarding the letter writer's "basis of knowledge." But, as discussed previously, probable cause does not demand the certainty we associate with formal trials. It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gateses or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability. It is apparent, therefore, that the judge issuing the warrant had a "substantial basis for...conclud[ing]" that probable cause to search the Gateses' home and car existed. Illinois v. Gates, 103 S.Ct. at 2335-2336.

The Illinois Supreme Court thought that the verification of details contained in the anonymous letter in this case amounted only to '[t]he corroboration of innocent activity'...and this was insufficient to support a finding of probable cause. We are inclined to agree, however...that '[i]n this case, just as in Draper, seemingly innocent activity became suspicious in light of the initial tip'...it bears noting that all of the corroborating detail established in Draper, was of entirely innocent activity... probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypotheses, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to sub

> silentio impose a drastically more rigorous definition of probable cause than the security of our citizens' [sic] demands... In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty', but the degree of suspicion that attaches to particular types of criminal acts.

Gates, 462 U.S. at 243, F.N. 13. The Pennsylvania courts said that the information which was provided and corroborated could have come from any neighbor, friend or acquaintance. See Appendix pp.33. The Gates court said that the defendant's travel plans could have been obtained from a talkative neighbor or travel agent, but that there was a "fair probability" that the anonymous tipster had obtained his information from defendants or someone they trusted. Probable cause does not demand the same certainty as a formal trial; the fair probability was provided by the letter's prediction. Id. at 246. In the instant case, the fair probability that the

information was reliable was corroborated by the officer's observations upon the defendant's return from Philadelphia, as predicted by the informant.

Had the Pennsylvania courts correctly read and applied the decisions of this Honorable Court in Gates, Draper and Harris, supra, they could only have determined that there was a sufficient showing of probable cause in the instant case for the officer to search the respondent's vehicle. The courts' decisions are therefore in clear conflict with the decisions of this Court.

II.

State courts have differed in their opinions of what constitutes probable cause in situations similar to the instant case, differing not only between states but among different courts within the same state. Further guidance is needed from this Honorable Court.

In cases with similar factual circumstances, courts have reached

varying conclusions concerning the requirements for a sufficient showing of probable cause to search. Under the facts of the instant case, the Pennsylvania courts found probable cause lacking. In Minnis v. State, 577 So.2d 973 (Fla.App. 4 Dist. 1991), the court found that probable cause to stop and search the defendant's vehicle existed based on independent police corroboration of the defendant's physical description, date of birth and residence, the type of car involved and the location where the illegal activity was to occur. Id. at 977.

In State v. Brown, 798 P.2d 284 (Utah App. 1990), a citizen informant, as in the instant case, provided information of illegal drug activity to the authorities. The court noted that the informant was not expecting personal benefit in providing the information, as

might be the case with a paid informant. Therefore, "his veracity should not be subject to rigid scrutiny." Id. at 286-287. Based on the fact that the informant was a known, concerned citizen, with personal knowledge of the illegal activity, who was able to describe the location of the illegal activity, and where the police verified all of this information, under the totality of the circumstances a search warrant was supported by sufficient probable cause. Id. at 287.

Similarly, probable cause was found to exist for a warrantless search in State v. Tays, 836 S.W.2d 596 (Tenn.Cr.App. 1992). In that case, an informant provided information that the defendant was supplying Dilaudid to dealers throughout Nashville. The arresting officer verified the information he received and set up

surveillance to observe the defendant's travel activity as predicted. Upon the defendant's return from a flight from Chicago, the officer observed the defendant depart from the airport in a vehicle driven by defendant's wife. At this point, he was certain of the identity of the defendant. He stopped the vehicle, arrested the defendant and searched his vehicle, finding plastic bags containing Dilaudid. The court compared the case to Draper, supra, and found that the verification of details by the officer resulted in a sufficient showing of probable cause for the arrest and search, and affirmed the conviction. Id. at 600.

The New York Court of Appeals was presented with a case which contained facts very similar to the instant case. An informant voluntarily reported to officers at a police station that the

defendant was selling cocaine. The police had never utilized this informant before; the informant said he came forward because he wanted help in getting into a drug treatment program. The informant was sent to meet with the defendant to make a controlled "buy" with $200.00 provided by the police. When the informant came back from this meeting, he told police that the arrangements were: the defendant was going to Rochester in a white Chevrolet Impala (previously observed by one of the officers in the defendant's driveway) to pick up the cocaine; the defendant would then return via Route 490 in one hour forty-five minutes to deliver the cocaine to the informant. A few minutes later, the police observed the defendant leaving in the direction indicated by the informant. Approximately one and one half hours later, the defendant was observed

returning on Route 490. The police stopped the car, arrested the occupants, and seized the cocaine found inside the vehicle. The Court found that under an Aquilar/Spinelli analysis, the veracity prong of the test had been satisfied by the officer's verification of the "innocent" details concerning the defendant's trip to Rochester. As there was no challenge to the informant's basis of knowledge, the police had probable cause for the warrantless arrest of the defendant. People v. DiFalco, ___N.E.2d___ (N.Y. 1993), 1993 WL 47279 (N.Y.). Other than the controlled "buy", the facts track those of the instant case. In the present case, the informant voluntarily came to the police station. He came forward because he was trying to do something to help himself about his drug habit. He told the officer where the defendant was going to pick up drugs,

and when and by what route the defendant would return. These details were corroborated by the police. The Pennsylvania courts found, under the Gates test, that the corroboration was insufficient for a showing of probable cause to search. The New York court, using the more stringent Aquilar/Spinelli test, found that the corroboration was sufficient (for the veracity component) to find probable cause for a warrantless arrest.

The foregoing has been a sample of court decisions which have disagreed with the state courts' decisions in the instant case. Massachusetts courts have looked at similar cases and reached conclusions which align with the present case. In Commonwealth v. Brown, 582 N.E.2d 505 (Mass.App.Ct. 1991), the Appeals court found that probable cause to search did not exist where the

confidential informant's information concerning the defendant (name, physical appearance, method of travel, and time and place of arrival) was not sufficiently detailed. The court said that since the informant said only that the defendant would be wearing "casual clothes", and did not mention he would be carrying a maroon colored shoulder bag or other baggage, the information did not rise to the "level of particularity of description and corroboration" present in Draper. Id. at 508. See also Commonwealth v. Ramon, 588 N.E.2d 883 (Mass.App.Ct. 1992).

And yet, in another Massachusetts case the Massachusetts Supreme Court seems to have taken a different view. In Commonwealth v. Bakoian, 588 N.E.2d 667 (Mass. 1992), a confidential informant provided a detective with information that the defendant and another were en

route from Rhode Island to Massachusetts with a shipment of heroin. The informant described the vehicle and gave the registration number. The informant indicated the approximate time of arrival at the defendant's apartment. The detective had previously arrested the defendant and therefore knew the address. Surveillance was set up. Upon arrival, the defendant was detained and his vehicle was searched. Heroin was located in the engine compartment. The court found that the details provided by the informant could not have been easily obtained by an uninformed bystander. Further, the fact that the informant was identified (and had previously supplied information) strengthened credibility. Finally, the police corroboration added to the informant's reliability. The court considered the details provided by the informant to be sufficiently

specific, and concluded that the required probable cause was present. Id. at 671-672.

Massachusetts is not the only state which has produced conflicting decisions when faced with similar factual situations. In Commonwealth v. Weidenmoyer, 539 A.2d 1291 (Pa. 1988), a search warrant was obtained based upon an informant's tip. The Pennsylvania Supreme Court said: "It may be fairly stated that where an informant is not a paid, unknown tipster but instead an identified eyewitness to a crime who voluntarily reports his observations to the police, the trustworthiness of such a person may be presumed." Id. at 1295. The court concluded that the reliability of the informant, coupled with the corroboration of the information by the police, was enough for the district justice who issued the warrant to

conclude that "the probability of criminal activity was presented". Id. at 1297. The Commonwealth contends that the instant case presented the Pennsylvania courts with a similar situation - an unpaid, known informant who voluntarily came forward and whose information was corroborated by the officer. Moreover, the informant made a declaration against penal interest. The Commonwealth fails to see how the courts could have reached a different result.

Line drawing in such cases is inherently difficult. Decisions by the courts will always turn upon the specific details of the individual case, and no two cases will ever be identical. However, the Commonwealth contends that, where the facts are arguably similar, courts are reaching varied and seemingly arbitrary results. This leaves lower courts, district justices, and police

officers with no guidelines at all. Without further guidance from this Honorable Court, it would seem that justice will vary not only from state to state, but from court to court.

CONCLUSION

The instant case presented the Pennsylvania appellate courts with evidence which was exceedingly similar to cases concerning probable cause which have been decided by this Honorable Court. The Pennsylvania courts, in a misinterpretation of these decisions, have reached a conclusion which conflicts with these decisions. The Commonwealth respectfully submits that for this reason the petition for certiorari should be granted. Moreover, other courts' decisions regarding the same issue under similar circumstances are in conflict with the decisions of this Court, with decisions of other states' courts, and even with other courts within the same state. The clearest possible

determination of what constitutes probable cause is respectfully requested.

Respectfully submitted,

Robert W. Ferrell, III

Robert W. Ferrell, III
Assistant District Attorney
I.D. #36811
Counsel for Petitioner

Kenneth A. Osokow, Esquire
First Assistant District Atty.
I.D. #22554

Lycoming County Courthouse
48 West Third Street
Williamsport, PA 17701
(717) 327-2456

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

COMMONWEALTH OF PENNSYLVANIA, PETITIONER
V.
MARVIN THOMAS MATTHEWS, RESPONDENT

CERTIFICATE OF SERVICE

I, Robert W. Ferrell, III, a member of the Bar of this Court, hereby certify that on this 24th day of May, 1993, three copies of the Petition for Writ of Certiorari in the above entitled case were served upon Jay Stillman, Esquire, Lycoming County Courthouse, 48 West Third Street, Williamsport, PA 17701 by personal service. I further certify that all parties required to be served have been served.

Robert W. Ferrell, III
Robert W. Ferrell, III
I.D. #36811
Attorney for Petitioner

Kenneth A. Osokow, Esquire
I.D. #22554
Lycoming County Courthouse
48 West Third Street
Williamsport, PA 17701
(717) 327-2456

IN THE COURT OF COMMON PLEAS
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
VS.	:	NO. 90-11,204
MARVIN MATTHEWS	:	MOTION TO SUPPRESS

OPINION AND ORDER

On September 14, 1990, Defendant was arrested and charged with possession of cocaine, possession with intent to deliver cocaine, and possession of drug paraphernalia. Defendant thereafter filed the instant suppression motion, seeking to suppress the physical evidence seized during a search of his vehicle at the time of arrest. After a hearing on said motion, held February 26, 1991, the Court makes the following:

FINDINGS OF FACT

1. At 1:30 a.m. on September 14, 1990, Officer Sorage of the Williamsport

Police was asked by his superior to interview an individual at City Hall.

2. Officer Sorage did interview the individual, who informed him that one Marvin Matthews was bringing controlled substances into Williamsport.

3. The informant then provided the following details to Officer Sorage:

(a) that Mr. Matthews lives with his girlfriend Juanita Hester;

(b) that the couple lived on Market Street above a shoe repair shop, and that Mr. Matthews drove a small brown, two-door vehicle, believed by the informant to be a Renault Alliance;

(c) that earlier that day, the informant had been in contact with Mr. Matthews, that Mr. Matthews at that time had indicated that he was going that day to Philadelphia to get cocaine, that Mr. Matthews would be bringing the cocaine back to Williamsport, and that Mr. Matthews would be returning at any time;

(d) that he, the informant, had gone in the past to Philadelphia with Mr. Matthews to purchase cocaine;

(e) that he, the informant, was addicted to cocaine and wanted to turn in his supplier in an attempt to end his addiction:

(f) that Mr. Matthews usually returns from Philadelphia around 1:30 - 2:00 a.m., and that on this particular trip Mr. Matthews was planning to purchase $2,000 worth of cocaine;

(g) that numerous people were waiting to purchase cocaine from Mr. Matthews upon his return;

(h) that Mr. Matthews would be entering Williamsport over the Market Street bridge; and

(i) that Mr. Matthews is a black male from Philadelphia who deals in crack cocaine.

4. Officer Sorage then checked his records and discovered that Juanita Hester lives at 236 Market Street, Williamsport.

5. Officer Sorage knew from his own experience that a vehicle similar to the one described by the informant usually parked his car in an alley near his apartment.)

6. Officer Sorage then checked the phone number given to him by the informant, and confirmed that such number

was listed to one M. Matthews at 236 Market Street, Apartment 3B.

7. The informant indicated to Officer Sorage that he was willing to accompany him to Defendant's apartment and wait with him until Defendant returned.

8. At 2:05 a.m. Officer Sorage and the informant drove to Market Street and parked at a location from which they could see vehicles coming over the Market Street bridge.

9. At 2:21 a.m., approximately fifty minutes after the informant presented himself at City Hall, Defendant's vehicle, which was so identified by the informant, crossed the Market Street bridge into Williamsport.

10. This vehicle parked in the alley, as had been described by the informant. The driver was a black male, and with him was a black female.

11. The informant indicated to Officer Sorage that the driver was Marvin Matthews.

12. Officer Sorage then exited his unmarked vehicle and approached Defendant's vehicle.

13. The driver of the vehicle identified himself as Marvin Thomas Matthews.

14. Mr. Matthews was unable to produce a driver's license, but he did produce a registration for the vehicle.

15. Officer Sorage then asked Defendant where he was coming from, and Defendant replied that he had come from Philadelphia. Defendant stated that he had left earlier that day to see his family there, and was just returning.

16. Officer Sorage then advised Defendant that he had been informed that Defendant was carrying controlled

substances, and asked Defendant if he could search his vehicle.

17. Defendant refused Officer Sorage's request to search his vehicle.

18. Officer Sorage advised Defendant that he would search the vehicle anyway, and search was then initiated.

19. Upon opening the trunk of the vehicle, Officer Sorage discovered a paper bag containing a number of plastic vials and caps.

20. Officer Sorage has had experience working on the Lycoming County Drug Task Force, and thus recognized the vials as being of the type used to package crack cocaine. Officer Sorage also found in the trunk a small baggie containing a white crystalline substance.

21. Upon being confronted with such, Defendant claimed that he used the vials to sell perfume, and that the white

AP

compound was not what the officer thought that it was.

22. Defendant was then placed under arrest, and his vehicle was impounded and taken to the City Highway Garage for a further search.

23. Officer Sorage testified that he moved the vehicle to the garage because he needed certain tools to [illegible] In addition, officers [illegible] loose screws in the taxi light area.

24. Officer Sorage testified that he removed the vehicle to the garage for the further reason that people had started to mill about the initial search area and the police had had to ask them to stay back. He thus believed the search at the garage to simply be a continuation of the search at the scene.

25. Officer Sorage testified that he stopped Defendant as he was getting

out of his vehicle because he, Officer Sorage, feared that if Defendant left the scene, he might be taking cocaine with him.

26. At the garage, Lt. Wise of the Williamsport Police found a plastic baggie in the tail light assembly which baggie contained a white substance believed by the officer to be cocaine.

27. The white substance

28. The police then obtained a search warrant in order to do a further search of those areas of the vehicle which were not immediately accessible.

29. The search conducted pursuant to the search warrant produced only some papers with names and phone numbers on them.

30. September 14, 1990 was the first occasion on which the informant had provided information to the police.

A8

Officer Sorage thus had no familiarity with the informant.

31. Officer Sorage had not heard of Defendant prior to September 14, 1990.

32. The police found no contraband upon the persons of Defendant or his female passenger.

DISCUSSION

In Illinois v. Gates, 462 U.S. 213, 230-37 (1983), the United States Supreme Court stated a new test for analyzing the sufficiency of probable cause to support search warrants. The Supreme Court stated as follows:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for ... concluding that probable cause existed.

A9

462 U.S. at 238-39, 103 S.Ct. at 2332. In announcing this test the United States Supreme Court discarded the more demanding standard for determining probable cause referred to as the "Aguilar - Spinelli" test.[1]

Our state appellate courts have accepted the Illinois v. Gates standard and have determined this test to be "more practical" than other tests. Commonwealth v. Chandler, 505 Pa. 113, 119, 477 A.2d 851, 853 (1984). In the case of Commonwealth v. Gray, ___ Pa. ___, 503 A.2d 921 (1985), the Pennsylvania Supreme Court specifically accepted this

---

[1]The "Aguilar-Spinelli" test required a showing of the reliability and underlying circumstances of an informant's information before such could be the basis for a probable cause so as to justify a search. A failure to establish either prong of the test would lead to a finding of insufficient information for probable cause.

"totality of the circumstances" approach and adopted the Gates standard as Pennsylvania law. 503 A.2d at 926. The Court in Commonwealth v. Gray, supra, while noting that the information contained in a search warrant did not satisfy the "Aguilar - Spinelli" standard, found sufficient information under the Gates standard to allow the search. The Court, in looking at the totality of all the facts in the warrant, found such to render the informant's information credible or reliable. The Court noted as follows:

> Their total effect confirms it with the ring of truth which is sufficient for men of commonsense to conclude that a search is reasonable and justified by probable cause.

Id. at 926.

In the instant case, the totality of the circumstances known to Officer Sorage when he confronted Defendant at 2:21 a.m. clearly provided him with probable cause

 All

to search Defendant's vehicle. The informant's information was clear and precise. Many of the surrounding circumstances conveyed by the informant were corroborated by the officer's own investigation. This included the name of the party occupying the apartment in question, the telephone listing to Mr. Matthews at 236 Market Street, Apartment 3B, and the officer's knowledge of a vehicle which parked at this location which was similar to the vehicle described by the informant. Of even more importance, however, is the fact that Defendant then returned at the time the informant said he would. Further, the Defendant, when approached by the officer, verbally confirmed that he was returning from Philadelphia, the location from where the informant claimed Defendant would be returning after picking up drugs. Further, the informant

provided the officer with the underlying circumstances of his knowledge by telling the officer that earlier that day Defendant himself told him he was going to Philadelphia to buy cocaine. Moreover, informant's reliability was also enhanced by his admissions that he was a user of cocaine and the Defendant was his supplier, and that he had gone with Defendant in the past to purchase cocaine in Philadelphia. When all of this evidence is considered, including the informant's identification of Defendant at the scene just before the stop, the totality of the circumstances establishes probable cause for the

A13

search.[2] That is, Officer Sorage had probable cause to believe that Defendant had cocaine, which he had just purchased in Philadelphia, located in his vehicle.

We do not feel this case is controlled by the Superior Court's decision in Commonwealth v. Ogborne, 384 Pa.Super. 604, 559 A.2d 931 (1989). While the Ogborne case involved a vehicle stop to search for drugs based upon an informant's tip that a suspect would be carrying drugs, the police in Ogborne did

---

[2]Although a closer question, it is quite arguable that the informant's information might even pass the more difficult "Aguilar-Spinelli" test. The underlying circumstances or basis of the informant's knowledge was revealed. Further, although the informant was unknown to the officer before this occasion, his reliability may be established by the fact that much of his information was a declaration against his interest as he incriminated himself in a drug possession conspiracy. See Commonwealth v. Moss, 543 A.2d 514 (Pa. 1988) (indicating that an informant's statement to someone of authority which is against penal interest bears some indication of reliability).

A14

not know the basis of the informant's tip. The Superior Court thus viewed the informant's information as uncorroborated and unverified. Here the police were made aware of the informant's relationship to Defendant, who supplied the informant with drugs. The police were also made aware that Defendant told the informant on that very day that he was travelling to Philadelphia to pick up cocaine. Defendant's return at the predicted time plus his admission to the officer that he was returning from Philadelphia were corroborative of the informant's prior information.[3]

---

[3]We do not mean to say that anytime a confidential informant claims an individual is holding or transporting drugs that probable cause automatically attaches. Rather, in each case a court or magistrate will have to look at the particular articulates facts to determine whether there is a "fair probability" that evidence of a crime will be found in a particular case. The court thus must look to the totality of circumstances presented and make a reasonable and common sense judgment based on the facts presented.

As there was sufficient probable cause for a search, Officer Sorage lawfully searched Defendant's vehicle without a search warrant. There was not sufficient time, unlike Commonwealth v. Ogborne, supra, in which to obtain a search warrant before the search. The confrontation with Defendant occurred only fifty minutes after the informant came to City Hall. The vehicle which held the controlled substance was, of course, mobile. The informant's information indicated that a number of individuals were ready to purchase the cocaine upon Defendant's return, so it appeared that the cocaine would be promptly distributed. The exigencies of the situation thus required an immediate search. Further, the search of the vehicle on the street having been properly undertaken, the police could lawfully move the vehicle to the garage

to accomplish the search away from the glare of onlookers at the scene of the stop. See Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970); Texas v. White, 423 U.S. 67, 96 S.Ct. 304 (1975); Commonwealth v. Baker, ___Pa.Super.___, 500 A.2d 483 (1985). The police thus lawfully searched the vehicle at the garage without a search warrant.

Accordingly, the following will be entered:

ORDER

AND NOW, this 13th day of May, 1991, Defendant's Motion to Suppress is hereby DENIED.

By The Court,

Kenneth D. Brown, Judge

cc: Ct. Adm.
District Attorney
William Miele, Esq. (PD)
Stacy Hollick, Esq. (1)

A17

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNA.
VS.	:	NO. 644HBG91
MARVIN THOMAS MATTHEWS, APPELLANT	:	

Appeal from the Judgment of Sentence, October 8, 1991, Docketed October 11, 1991, in the Court of Common Pleas of Lycoming County, Criminal Division, No. 90-11,204.

BEFORE: MCEWEN, FORD ELLIOTT, AND HESTER, JJ.

MEMORANDUM: FILED: JULY 22, 1992

Appellant was convicted of possession of a controlled substance,[1] possession with intent to deliver,[2] and possession of drug paraphernalia[3] The essence of this appeal is appellant's argument that evidence vital to his convictions, an ounce of cocaine and six hundred plastic vials and caps, was

---

[1]35 P.S. Section 780-113(a)(16).

[2]35 P.S. Section 780-113(a)(30).

[3]35 P.S. Section 780-113(a)(32).

A18

discovered by police pursuant to a search for which they lacked probable cause. We agree with appellant that the suppression court erred in not suppressing this evidence. Accordingly, we will vacate the judgment of sentence of October 8, 1991, and remand for a new trial consistent with this opinion.[4]

Because they are supported by the record and are not challenged by the appellant, we will reiterate verbatim the findings of fact of the suppression court rather than embark upon our own retelling of the factual background:

1. At 1:30 a.m. on September 14, 1990, Officer Sorage of the Williamsport

---

[4]We recognize that the Commonwealth very likely will choose not to reprosecute this case without the availability of the cocaine and vials evidence.

A19

police was asked by his supervisor to interview an individual at City Hall.

2. Officer Savage did interview the individual, who informed him that one Marvin Matthews was bringing controlled substances into Williamsport.

3. The informant then provided the following details to Officer Savage:

(a) that Mr. Matthews lives with his girlfriend Juanita Hester;

(b) that the couple lived on Market Street above a shoe repair shop, and that Mr. Matthews drove a small brown, two-door vehicle, believed by the informant to be a Renault Alliance;

(c) that earlier that day, the informant had been in contact with Mr. Matthews, that Mr. Matthews at that time had indicated that he was going that day to Philadelphia to get cocaine, that Mr. Matthews would be bringing the cocaine back to Williamsport, and that Mr. Matthews would be returning at any time;

(d) that he, the informant, had gone in the past to Philadelphia with Mr. Matthews to purchase cocaine;

(e) that he, the informant, was addicted to cocaine and wanted to turn in his supplier in an attempt to end his addiction;

(3) that Mr. Matthews usually returns from Philadelphia around 1:30 - 2:00 a.m., and that on this particular trip Mr. Matthews was planning to purchase $2,000 worth of cocaine;

(4) that numerous people were waiting to purchase cocaine from Mr. Matthews upon his return;

(5) that Mr. Matthews would be entering Williamsport over the Market Street bridge; and

(6) that Mr. Matthews is a black male from Philadelphia who deals in crack cocaine.

4. Officer Sorage then checked his records and discovered that Juanita Hester lives at 236 Market Street, Williamsport.

5. Officer Sorage knew from his own experience that a vehicle similar to the one described by the informant usually parked his car in an alley near his apartment.)

6. Officer Sorage then checked the phone number given to him by the informant, and confirmed that such number

was listed to one N. Matthews at 235 Market Street, Apartment 3B.

7. The informant indicated to Officer Scragg that he was willing to accompany him to Defendant's apartment and wait with him until Defendant returned.

8. At 2:05 a.m. Officer Scragg and the informant drove to Market Street and parked at a location from which they could see vehicles coming over the Market Street bridge.

9. At 2:21 a.m., approximately fifty minutes after the informant presented himself at City Hall, Defendant's vehicle, which was so identified by the informant, crossed the Market Street bridge into Williamsport.

10. This vehicle parked in the alley, as had been described by the informant. The driver was a black male, and with him was a black female.

A22

11. The informant indicated to Officer Sorage that the driver was Marvin Matthews.

12. Officer Sorage then exited his unmarked vehicle and approached Defendant's vehicle.

13. The driver of the vehicle identified himself as Marvin Thomas Matthews.

14. Mr. Mathews was unable to produce a drivers license, but he did produce a registration for the vehicle.

15. Office Sorage then asked Defendant where he was coming from, and Defendant replied that he had come from Philadelphia. Defendant stated that he had left earlier that day to see his family there, and was just returning.

16. Office Sorage then advised Defendant that he had been informed that Defendant was carrying controlled

A 23

substances, and asked Defendant if he could search his vehicle.

17. Defendant refused Officer Sorage's request to search his vehicle.

18. Officer Sorage advised Defendant that he would search the vehicle anyway, and search was then initiated.

19. Upon opening the trunk of the vehicle, Officer Sorage discovered a paper bag containing six hundred plastic vials and caps.

20. Officer Sorage has had experience working on the Lycoming County Drug Task Force, and thus recognized the vials as being of the type used to package crack cocaine. Officer Sorage also found in the trunk a small baggie containing a white crystalline substance.

21. Upon being confronted with such, Defendant claimed that he used the vials to sell perfume, and that the white

compound was not what the officer thought that it was.

22. Defendant was then placed under arrest, and his vehicle was impounded and taken to the City Highway Garage for a further search.

23. Officer Sorage testified that he moved the vehicle to the garage because he needed certain tools to proceed further with the search. In addition, Officer Sorage had noticed some loose screws in the tail light area.

24. Officer Sorage testified that he removed the vehicle to the garage for the further reason that people had started to mill about the initial search area and the police had had to ask them to stay back. He thus believed the search at the garage to simply be a continuation of the search at the scene.

25. Officer Sorage testified that he stopped Defendant as he was getting

out of his vehicle because he, Officer Sorage, feared that if Defendant left the scene, he might be taking cocaine with him.

26. At the garage, Lt. Wise of the Williamsport Police found a plastic baggie in the tail light assembly which baggie contained a white substance believed by the officer to be cocaine.

27. The white substance field-tested positive for cocaine.

28. The police then obtained a search warrant in order to do a further search of those areas of the vehicle which were not immediately accessible.

29. The search conducted pursuant to the search warrant produced only some papers with names and phone numbers on them.

30. September-14, 1990 was the first occasion on which the informant had provided information to the police.

Officer Sorage thus had no familiarity with the informant.

31. Officer Sorage had not heard of Defendant prior to September 14, 1990.

32. The police found no contraband upon the persons of Defendant or his female passenger.

We have previously described our standard of review as follows:

> Initially we note that our function as an appellate court reviewing a denial of a motion to suppress is to determine:
>
> [W]hether the record supports the suppression court's factual findings and the legitimacy of the inferences and legal conclusions drawn from those findings. In making this determination, we consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted.

Commonwealth v. Reddix, 355 Pa.Superior Ct. 514, 518, 513 A.2d 1041, 1043 (1986), quoting Commonwealth v. W.P., 302 Pa.Superior Ct. 66, 69, 448 A.2d 97, 98 (1982). Moreover, when the evidence viewed in this manner supports the factual findings of the suppression court, we can reverse only is there is an error in the legal conclusion drawn from those factual findings.

A27

Commonwealth v. Vinson, 361 Pa. Super. 526, 522 A.2d 1155 (1987). As we have already mentioned, we believe that the record adequately supports the factual findings of the suppression court. It is the suppression court's legal conclusion that the police had probable cause to conduct the search of appellant's car that troubles us. We believe that the police did not have probable cause to conduct the search.

Prefacing our discussion, we note that the instant search was conducted without benefit of a warrant and that, ordinarily, searches performed without a warrant are held to be constitutionally invalid unless exigent circumstances exist that justify the lack of a warrant. See Commonwealth v. Rispo, 338 Pa.Super. 225, 487 A.2d 937 (1985). Instantly, however, the trial court specifically

found that exigent circumstances existed[5] and there ws evidence of record to support this conclusion. Moreover, appellant does not challenge the existence of exigent circumstances on appeal. Therefore, we need not resolve this issue. Nevertheless, another requirement of all searches, with or without warrant, is the existence of probable cause. It is here where we diverge from the suppression court.

In evaluating whether an informant's tip gives rise to probable cause, we note that our analysis consists of an examination of the totality of the circumstances. See Illinois v. Gates, 462 U.S. 213 (1983). This test was adopted in Pennsylvania under

---

[5]Trial court opinion, 5/13/91 at 9.

A29

Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921 (1985), and has been applied in warrantless search cases such as Commonwealth v. Rodriquez, 526 Pa. 268, 585 A.2d 988 (1991). Viewing the search in the totality of the circumstances, we find probable cause lacking.

We point to the fact that there was little indication of the informer's reliability or the accuracy of his information as to appellant's drug dealing. This is not to say that the informer's reliability must be absolutely determined before probable cause arises. In point of fact, Pennsylvania courts have previously found probable cause where there was not averment of informant reliability, or where the source of information was anonymous. However, in each of those instances, other factors influenced the court.

A30

In Commonwealth v. Gray, supra, wherein our Supreme Court adopted the Gates test, probable cause was found despite the fact that information to police came from informants of unknown reliability. Still, the case differed from our instant situation because in Gray, multiple informants corroborated each other's information. In Commonwealth v. Silverman, 373 Pa.Super. 274, 541 A.2d 9 (1988), allocatur granted, 552 A.2d 251 (1988), appeal dismissed as having been improvidently granted, 564 A.2d 160 (1989), police received an anonymous tip. The informant identified the defendant's residence, that he resided with a woman named Carol, and that defendant had burglarized a David Weis store and had $40,000 worth of jewelry in his possession. Through independent work, police discovered a car owned by a relative of defendant in the

parking lot of the apartment complex indicated by the informant. Moreover, the defendant had a conviction record for theft and receiving stolen property. Finally, the police knew that a David Weis store located in a nearby town had been burglarized some ten months earlier and that approximately $40,000 worth of jewelry had been taken. The court held that under the Gates totality of circumstances test, there was probable cause to issue a search warrant.

Instantly, we have no corroboration by multiple informants, nor were the police aware of other evidence that served to corroborate the informant's information. The information which the police were able to verify through independent investigation, appellant's name, address, make of car, time of arrival, and the fact that he had visited Philadelphia, do not serve to heighten

the reliability of the final, critical item of information, that appellant was returning with drugs to deal. The information which was provided and verified was available to any friend, acquaintance, or neighbor and was not, in and of itself, incriminating. Therefore, the Gates test has not been met.

Finally, appellant has attempted to distinguish two cases which he believes may impinge upon our resolution of his appeal. These cases are Alabama v. White, 496 U.S. 325, 110 S.Ct 2412, 110 L.Ed.2d 301 (1990) and Commonwealth v. Ogborne, ___Pa.Super.____, 599 A.2d 656 (1991).[6] We do not believe these cases

[6]Ogborne is a reargument of Commonwealth v. Ogborne, 384 Pa.Super. 604, 559 A.2d 931 (1989), allocatur granted, 574 A.2d 68 (1990), appeal dismissed as having been improvidently granted, 583 A.2d 68 (1990). Reargument was heard upon remand from the United States Supreme Court, which vacated this court's previous decision for further consideration in light of Alabama v. White. Pennsylvania v. Ogborne, ___U.S.___, 111 S.Ct. 1408, 113 L.Ed.2d 462 (1991).

A33

apply to the instant situation. Both cases involve Terry[7] investigatory stops rather than the full blown search and seizure as is present in the case sub judice. The respective courts held that later police verification of the intimate details of an informer's tip gave rise to a reasonable suspicion that the ultimate implication of the tip, that the defendant was carrying drugs, was true. Thus, the ensuing Terry stops were justified. However, Terry represents an

---

[7]Terry v. Ohio, 392 U.S. 1 (1968). Terry, of course, is the celebrated case in which the United States Supreme Court held that police may, upon reasonable suspicion, conduct brief investigatory stops of suspects (stop and frisk).

exception to the more stringent rule under the Fourth Amendment requiring a showing of probable cause where a full blown search and/or seizure is conducted. Thus, the level of suspicion required to validate police action differs in degree between a Terry investigatory stop (reasonable suspicion) and a full blown search (probable cause). SeeAlabama v. White, 110 S.Ct. at 2416 and Ogborne 599 A.2d at 658. Alabama v. White and Ogborne are inapplicable instantly because in applying them here, they would be serving to validate a full blown search on the grounds of mere reasonable suspicion. Furthermore, we observe other critical distinctions.

In Alabama v. White, police received an anonymous tip that the defendant would be leaving an apartment building located at 235 Lynwood Terrace. The informant stated that the defendant would be

carrying a brown attache case and would get into a brown Plymouth automobile with a broken taillight. The informant said that the defendant would then proceed to drive to Dobey's Motel. The informant stated that the defendant was going to the motel to consummate a drug deal and that the attache case contained drugs. The police set up surveillance at the defendant's apartment. She emerged at the predicted time, not carrying the predicted attache, entered the predicted car, and drove along a direct route almost arriving at the predicted motel. The police then made an investigatory stop of the defendant. The defendant then consented to a full blown search of her car and drugs were found in a brown attache case located in the car.

The Supreme Court found that the police had reasonable suspicion to initiate the original investigatory stop.

The court found that although police had no information as to the informant's reliability, independent police investigation revealed that the informant had provided accurate information on a wealth of intimate details. The court was struck by the fact that the informant was able to predict the exact itinerary of the defendant. The court held that were an informant provides such detailed information, and the police are able to verify this information through independent investigation, they are justified in making the final leap of faith, that the information that the suspect is carrying drugs is true, and that the police have reasonable suspicion to make a Terry stop. The tip has been shown to exhibit sufficient "indicia of reliability". Still, the Supreme Court

opined that it was a close case as to whether the police actions were valid.[8]

The factual situation in Ogborne is closer to the present case. The informant's predicted facts and itinerary are almost identical (address, type of car, time of arrival, the fact that appellant was traveling from Philadelphia). Still, we must reiterate that Ogborne was determining the validity of an investigatory stop and not a search. Were we dealing with a mere investigatory stop, we might likewise find that the police had reached the requisite level of suspicion.

We note a final distinction between the case sub judice and Alabama v. White and Ogborne. In the latter two cases,

---

[8] Alabama v. White, 110 S.Ct. at 2417.

A38

valid searches and seizures occurred following the investigatory stops. In both cases events took place during the investigatory stops that validated the subsequent searches. In Alabama v. White, the defendant consented to a search. In Ogborne the police noticed the odor of PCP in the defendant's car during the stop, thus giving rise to probable cause to conduct a search. Instantly appellant denied police consent to search his car and police noticed nothing during the stop that further aroused their suspicions.

In sum, we believe that neither Alabama v. White nor Commonwealth v. Ogborne is apposite instantly.

Accordingly, the judgment of sentence of October 8, 1991, is hereby vacated and the case is remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

A39

JUDGMENT ENTERED

DATED: 07/22/92

_____

DEPUTY PROTHONOTARY

 A40

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNA.
	:	
VS.	:	NO. 644HBG91
	:	
MARVIN THOMAS MATTHEWS, APPELLANT	:	

ORDER OF COURT

The court hereby denies the application filed August 5, 1992 requesting reargument or reconsideration of the decision dated July 22, 1992.

PER CURIAM

DATE: October 5, 1992

TRUE AND CORRECT COPY
ATTEST: October 6, 1992

_____
Appellate Clerk

A41

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	NO. 435 MIDDLE DISTRICT ALLOCATUR DOCKET 1992
VS.	:	
MARVIN THOMAS MATTHEWS, RESPONDENT:	:	PETITION FOR ALLOWANCE OF APPEAL FROM THE SUPERIOR COURT

ORDER

PER CURIAM

AND NOW, this 17th day of February, 1993, the Petition for Allowance of Appeal from the Superior Court is hereby denied.

TRUE & CORRECT COPY
ATTEST: FEB 17, 1993

Assistant Chief Clerk

A42